82-929

No. 82—

IN THE

Supreme Court of the United States

DECEMBER TERM, 1982

GERALD BURKS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

EDWARD J. EGAN,
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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the defendant was denied due process by knowing use of perjured testimony or by a false statement by the prosecutor in his argument to the jury.

The defendant, Gerald Burks, was convicted of murder and sentenced to 50 years in the penitentiary. A witness, Henry Trapp, testified that he assisted the defendant, his co-defendant and another man named Shannon in the killing of Venson Bass.

At the time he testified there was an armed robbery charge pending against him. He testified that he was expecting leniency in sentencing. After the defense attorney in his closing argument urged that Trapp would not go to the penitentiary, the Assistant State's Attorney denied that in his argument and told the jury that Trapp was going to the penitentiary.

Less than a month after the trial the State dismissed the robbery indictment against Bass.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, appears in Appendix A hereto. The opinion was rendered in an order under Illinois Supreme Court Rule 23. *People* v. *Harris* (1982), 104 Ill. App. 3d 1202, 437 N.E. 2d 944.

PARTIES BELOW

The names of all parties to this petition appear in the caption of the case.

JURISDICTION

On March 25, 1982, the Appellate Court of Illinois, First District, affirmed the conviction of the defendant. On October 5, 1982, the Supreme Court of Illinois denied the defendant's petition for leave to appeal. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV.

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Henry Trapp testified that he had dealt in narcotics with the defendant for about four months. He and Eddie Harris went to "Marlo's Dope House" to pick up the deceased, Venson Bass, and drove him to "Marlo's" apartment. He said that Harris and Bass went into the apartment building. He then saw Herman Shannon come out of the building, followed by Harris and the defendant supporting Bass. Bass was slumped over and bleeding. They all got into the car and Burks and Shannon were talking to Bass. He heard Bass say he didn't take any money. Harris got into the back seat of the car, hit Bass with a pistol and then shot him in the neck. He said he stayed in the car while Shannon, Burks and Harris took Bass and dumped him into the lake. He heard Harris say Bass was trying to swim, and then he heard four or five more shots.

Trapp had previous convictions for robbery in 1975 and was sentenced to the penitentiary for one year to one year and a day. In September of 1972, he was convicted of misdemeanor theft in Evanston, Illinois and sentenced to nine months in the County Jail. At the time he testified, he had an armed robbery charge pending in the Circuit Court of Cook County.

He first became a narcotics addict in 1968. He was addicted to heroin. He completed a detoxification program but began using heroin again. After he got out of the penitentiary, he got a job as an ex-addict counselor in a federally funded program. After that program closed, he began using heroin until the latter part of 1977. He was using narcotics at the time of the shooting of Bass.

At the time he testified, he was residing in the witness quarters of the County Jail which are maintained by the

State's Attorney. He had testified in the armed robbery case that was pending against co-defendants. He testified with the hope that he would get a "lesser sentence." The State's Attorney asked him if he would testify, since his intentions "were pleading guilty anyway," because he was involved in it. He agreed to testify with his own hope that perhaps he would get a lesser sentence. They told him to testify and take his chances. He was hoping they would be lenient. There is a mandatory sentence in that type of crime, so he was hoping to get a lesser sentence. At first when he talked to the State's Attorney, he told him he didn't know anything about the robbery.

In his closing argument, the defense attorney argued that Trapp would not go to the penitentiary. In the State's closing argument, Assistant State's Attorney Arthur refuted that statement and said, "Trapp is going to the penitentiary. We are not going to set them up. They are not going to live at the Hyatt Regency tomorrow. They are going to the penitentiary."

At a post-trial hearing, the other Assistant State's Attorney, Wayne Meyer, was questioned by the defendant's attorney about what agreement had been made with Trapp. The following occurred:

> "Mr. Cohn: Q. The decision was then made that Harry Trapp would not be prosecuted for murder. Isn't that true?
>
> "A. There was a decision made that he be given some sort of consideration. But I was never quite clear how much consideration would be given in that I was only assisting the prosecution of the case. And Scott Arthur was the main prosecutor. Obviously he had to check with his superiors.
>
> "Q. You knew; you were privy to the conversation that he would be given a benefit, weren't you?

"A. No. I was never involved in any discussion with him regarding immunity or with my supervisors or anybody else.

"Q. You mean you never talked with Mr. Arthur as to what benefits would accrue to the witness, Mr. Trapp?

"A. I knew Mr. Trapp was to be given some consideration. Whether that would be a full dismissal of the charges or pleading to a reduced charge, I never really was clear. It was really irrelevant to me.

"Q. Well, who examined Mr. Trapp?

"A. I don't recall, Counsel. I forget.

"Q. Well, how long did you work with Mr. Arthur on this case prior to its going to trial?

"A. I would have to guess maybe a week, maybe a little more. I'm really not sure.

"Q. And you knew that some consideration was going to be given Mr. Trapp for his testimony?

"A. Yes."

The defense then attempted to call Assistant State's Attorney Arthur to question him about what agreement had been made with Trapp. Arthur's objection to being called was sustained.

Less than a month after the trial, on June 18, 1980, Judge Thomas J. Fitzgerald allowed the State's motion to dismiss the pending robbery case against Trapp.

The constitutional question was not raised during the trial because the State did not dismiss the indictment against Trapp until 27 days after the jury verdict was rendered. It was raised in the Appellate Court in the defendant's opening brief. The Appellate Court passed on the question thus (See Appendix, Rule 23 Order, p. 11):

> In response during rebuttal argument the State's Attorney made the comment that Trapp is going to

the penitentiary. During post-trial motions one of the prosecutors who argued the case testified that he knew that Trapp was to be given some consideration. Burks argues that in the instant case Trapp was not prosecuted and he was not returned to the penitentiary. In another matter pending against Trapp the charges were dismissed. Although the record is not entirely clear on the subject, we do believe that the prosecutor was in error in making the statement. However, considering the extensive cross-examination on the subject and the fact that Trapp admitted that he had become the State's witness in an armed robbery case in hope of receiving some consideration, Trapp's character was fairly before the jury and this one comment does not warrant a new trial.

REASONS FOR GRANTING THE WRIT

In *Napue* v. *Illinois* (1959), 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, the defendant was convicted of murder principally on the testimony of a supposed eyewitness to the crime. That witness, George Hamer, had already been convicted of murder and sentenced to 199 years in the penitentiary.

Hamer testified that although he was serving a sentence for murder, he had not received any promises of "consideration" or a reduction of sentence in exchange for his testimony. (360 U.S. 264, 267-268, Notes 2, 3.) As in this case, the prosecutor never corrected that testimony.

After trial, the prosecutor filed a petition seeking a reduction of Hamer's sentence. He stated that he had "represented to Hamer that if he would be willing to cooperate with law enforcing officials . . . a recommendation for a reduction of his sentence would be made and, if possible, effectuated." (360 U.S. 264, 266, n. 1.)

This court reversed the conviction, holding that the prosecutor's failure to correct testimony he knew to be false deprived the defendant of a fair trial. This court further held that the basic rule that a State may not knowingly use false testimony to obtain a conviction "does not cease to apply merely because the false testimony goes only to the credibility of the witness." (360 U.S. 264, 269-70.)

Those principles were reaffirmed in *Giglio* v. *United States* (1972), 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104. In that case, like *Napue* and the present case, the defendant was convicted principally on the testimony of an alleged co-conspirator in the crime. In addition, the prosecutor there, as here, falsely stated in his closing argument that no promises had been made to the witness. The court reversed the conviction because the prosecutor failed to correct the witness' false testimony that he had not been promised any prosecutorial leniency in exchange against the defendant. The court held that such prosecutorial misconduct required reversal regardless of whether the failure to correct the witness' testimony was the result of negligence or by actual design. (405 U.S. 150, 154.)

In *United States* v. *Pope,* (9th Cir. 1976), 529 F. 2d 112, the defendant was prosecuted for armed robbery; and the prosecution's key witness was an alleged participant in the robbery. The witness was permitted to plead guilty to the lesser included offense of plain robbery. On April 1 and 2, 1975 he testified against the defendant's brother; and a week later he testified before a federal grand jury implicating the defendant. Thirteen days thereafter he was sentenced to serve only 150 days out of a 10 year suspended sentence.

A month and a half later he testified against the defendant. When he was asked about his guilty plea, he said that there was not any kind of agreement between him and the United States Attorney's office and there was no understanding at all with respect to his pleading guilty.

In final argument the government's attorney argued that the witness had no reason to lie, that he received "admittedly a light sentence." After trial, affidavits from the witness' attorney and the United States Attorney established that there was an agreement that the witness would be permitted to plead guilty to the lesser offense in return for his testimony against the defendant's *brother*. The government's argument in the Court of Appeals was that the promise extended to the witness' testimony against the defendant's brother and not the defendant. The Court of Appeals rejected that argument and reversed the conviction relying upon *Napue* and *Giglio*.

A case factually on all fours with this case is *United States* v. *Smith* (5th Cir. 1973), 480 F. 2d 664. The government and the witness entered into a plea bargain agreement whereby the government would not oppose probation in return for the witness' testimony. The terms of the agreement were not made known to the defense attorney. On cross-examination the witness said that he would have testified without any deals; and that the only deal he had was that he would get a two year prison term in return for his guilty plea.

During closing argument the defense attorney pointed to the government's agreement with the witness involving only two years in prison. The prosecutor, on rebuttal, attempted to reestablish the credibility of his witness thus:

> "Wayne Smiddy [the witness] and Troy Kivett made a deal with the government. *It was for two years in a*

> *federal penitentiary. That is a fantastic deal,* ladies and gentlemen. Troy Kivett pleaded guilty to one count which he can serve up to five years in the federal penitentiary. Is that a great deal?" (480 Fed. 2d 664, 666.) (Emphasis in opinion.)

The Court of Appeals reversed with this pointed observation (480 F. 2d, 664, 666):

> "This statement, although partially true, was not the whole truth and, in fact, the sentence 'It was for two years in a federal penitentiary' was such an affirmative misrepresentation as to make it, as used, absolutely false. The prosecutor who made this statement was the only party at the trial who had knowledge of the entire bargain."

We submit that the facts of this case are more egregious than the four Federal cases we have just cited.

We all must be considered consummate fools if the State expects us to believe that its agreement with Trapp was for a lesser sentence in the penitentiary. It is obvious that the jury was misled by the closing argument of Assistant State's Attorney Arthur; and to compound the matter, the trial judge was misled by the post-trial testimony of Assistant State's Attorney Meyer, who would have the court believe he was just a hired hand who came into the case late and had hazy idea of the agreement. He did not know whether it was "for a full dismissal of the charges or pleading to the reduced charge. He "never really was clear. *It was really irrelevant" to him.* (Emphasis added.) That is a shocking statement from a quasi-judicial officer who owes an obligation to the defendant to *insure* that he will receive a fair trial. The other Assistant State's Attorney, Mr. Arthur, who made the statement, made certain that he would not be questioned about the agreement. He objected to even testifying at the post-trial hearing; and that objection was sustained.

What is even more shocking about all this is that the Appellate Court charitably dismisses this argument with the statement that it believes "the prosecutor was in error in making that statement." (See Appendix A, Rule 23 Order, p. 11) The Appellate Court simply said, "This one comment does not require reversal"; and based its conclusion on the fact that Trapp had admitted that he had become a State's witness in an armed robbery case in hope of receiving some consideration. That precise reasoning was rejected in *Napue* v. *Illinois* in which this court said that a prosecutor has the duty to correct what he knows to be false and to elicit the truth; that it is immaterial that a falsehood bore only upon credibility; and that it was immaterial that the jury was apprised of other grounds for believing that the witness had received consideration. (3 L. Ed. 2d 1217, 1221.) These facts are worse than *Napue*.

CONCLUSION

For all these reasons we respectfully pray that this court will order that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District.

Respectfully submitted,

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APPENDIX A

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the deposit of the same.

Nos. 80-1954, 81-98 (Consolidated)

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* —vs— EDDIE HARRIS a/k/a EDWARD SHIEF-EL and GERALD BURKS, *Defendants-Appellants.*	Appeal from the Circuit Court of Cook County — Honorable **Francis J. Mahon,** Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

The defendants Gerald Burks and Edward Shief-El, also known as Eddie Harris, were convicted of murdering Venson Bass. Burks received a 50 year sentence under the extended term provision and Harris received an 80 year sentence. The trial was held before a jury and each defendant was separately represented by counsel. Both defendants raise extensive arguments concerning the prosecutor's misconduct. In addition, Burks claims that he was denied the effective assistance of counsel, the right to present evidence and due process. He also argues that the court erred in permitting an extended term sentence. Harris contends that he was not proved guilty beyond a reasonable doubt.

Venson Bass' body was found in Lake Michigan on April 21, 1978. An autopsy revealed the cause of death to be multiple gun shot wounds in the head and neck. The wound to the forehead showed both an entrance and exit wound that might have caused the death by itself.

The State presented two eyewitnesses. Herman Shannon, Jr., testified that on March 16, 1978, he was with Gerald Burks at Burks' house. Burks said that someone had broken into his house and that he suspected Bass and Sharon Weekly. Weekly denied that she had been at Burks' house and gave Burks the number of the person where she was. Burks called. That person denied that Weekly had been there. Burks continued to question Weekly. Eddie Harris came over and agreed to assist Burks in tricking Bass out of the place where he was hiding. Burks pointed a pistol at Bass at which point Bass made a motion with his hands inside his coat. Burks then fired, hitting Bass in the head. Burks and Harris put Bass in the back seat of Harris' car. Harris took Bass' gun and shot Bass in the neck. When they arrived at the lake Harris pulled Bass from the car and Burks, Harris and Shannon threw Bass into the lake. Shannon was going back to the car when he heard three or four shots and saw Harris shooting into the water. Harris said that he did not tell this story until after he was granted immunity from prosecution for his participation in the murder.

Harry Trapp, the other eyewitness, testified that he had known Harris for about four or five months and had dealt in narcotics with Burks for about four months. He was in the car when he saw Harris and Burks come out of a building supporting Bass who was slumped over and bleeding. Burks and Shannon talked to Bass in the car. Trapp heard Bass say he did not take any money. Harris got into

the back seat of the car and hit Bass with a pistol and then shot him in the neck. While the others took Bass and dumped him in the lake he heard Harris say Bass was trying to swim and he heard four or five more shots.

Harris, in arguing that he was not proved guilty beyond a reasonable doubt, notes the less than sterling character of the two witnesses for the State. Shannon had been a convicted thief and was serving time at the time of trial. He was a narcotics user at the time of the murder. Trapp had a current armed robbery prosecution pending. Harris also contends that Trapp's testimony is improbable because he stated that he heard Bass talk to Burks and Shannon in the back seat of the car after Bass had been shot in the head. The coroner had testified that the bullet wound in the head showed both entrance and exit wounds and could have been fatal in and of itself. We do not find the evidence so unsatisfactory to leave a reasonable doubt as to the defendant's guilt. The weight and credibility to be afforded the testimony of Shannon and Trapp was a matter for the determination of the jury. The record indicates that the jury was made aware of the prior convictions and involvement with drugs of these witnesses. Moreover, the jury instructions specifically addressed the issues of credibility of witnesses with prior convictions, the testimony of accomplices, and testimony given by drug addicts. Despite these factors, the jury after weighing their credibility, chose to believe the testimony of the State's witnesses.

Both parties argue extensively concerning the conduct of the prosecutor. They contend that the prosecutor improperly argued that they were narcotics dealers, implied that they had committed crimes other than that for which they were on trial, and suggested that the jury should

convict them on the basis of those unproven allegations. In support of this contention they point to the opening statement where the prosecutor referred to Shannon and Trapp as business associates of the defendants and the business as narcotics. In direct examination Shannon stated that they were more or less business associates. Shannon said he purchased narcotics from Burks and delivered pills to Harris. Shannon's testimony established that Burks told him that he suspected Bass of stealing narcotics and money from him. Burks, as well as Harris, argues that this evidence was immaterial and irrelevant. The State responds that it was relevant because narcotics was the motive for the killing. We think this response is appropriate. Although evidence of other crimes is generally inadmissible, evidence which establishes *motive,* intent, identity, accident or absence of mistake is admissible even though it may involve proof of a separate offense. (*People* v. *Manzella* (1973), 56 Ill. 2d 187, 306 N.E. 2d 16.) Here, the State was permitted to present evidence bearing upon the motive for the murder.

Harris and Burks contend that the prosecutor improperly commented upon their failure to testify. The prosecutor did this during rebuttal argument when he said that the defendants did not have to present any evidence but that they waived that right and presented a case that took them "exactly one minute and 38 seconds." Harris and Burks argue that the question is whether the comment was intended or calculated to focus the attention of the jury on the failure of the defendants to testify, citing *People* v. *Mills* (1968), 40 Ill. 2d 4, 237 N.E. 2d 697. The State notes that immediately before that statement was made the prosecutor said that the jury heard the State present evidence for two and one-half days. The State

concludes that the prosecutor was commenting on the uncontradicted nature of the State's case. We believe that the comment can fairly be construed that way, and it is not error to argue that the State's case is uncontradicted. *People* v. *Ganter* (1977), 56 Ill. App. 3d 316, 371 N.E. 2d 1072.

Along these same lines Burks argues that the prosecutor commented that of all the witnesses who were present at the shooting, the jury really only heard from Shannon. Burks contends that this is a comment on the defendants' failure to testify. The State contends that this was an invited comment because the defendants initiated the discussion as to the caliber of weapons when they commented on the testimony of the State's witnesses. The comment in question was made as a reply to the defendants' argument. We do not believe that this reference called attention to the defendants' failure to testify.

Burks contends that the prosecutor accused defense counsel of hiding a prosecution witness and called into question the motive and integrity of defense counsel. Harris makes a similar argument. This argument stems from comments made in opening and closing arguments by the State's Attorney. At opening argument he stated that Sharon Weekly did not respond to the subpoena but her mother told the police that she did not know where her daughter was but that if they had any further questions they could talk to her lawyer, Chester Slaughter. Chester Slaughter represented Gerald Burks in the proceedings. In closing argument the prosecutor commented that the State was not allowed to bring out the facts that it stated in the opening statement. The court sustained an objection to that statement. The defendants construe this as an attempt by the State to accuse defense counsel of the crime of ob-

structing jusice. They also contend that this was an impermissible attack on the motives and integrity of defense counsel. Along the same lines they refer to statements by the prosecutor which referred to the defendants' attorneys as "two professional defense attorneys" and suggested that defense counsel were attempting to "create confusion" in arguing "little puffs of smoke" and that the role of the attorneys was to try to "make a fool" out of the jury. Cited as authority for reversal are the cases of: *People* v. *Hovanec* (1976), 40 Ill. App. 3d 15, 351 N.E. 2d 402; *People* v. *Manroe* (1977), 66 Ill. 2d 317, 362 N.E. 2d 295; *People* v. *Weller* (1970), 123 Ill. App. 2d 421, 258 N.E. 2d 806; *People* v. *Mwathery* (1968), 103 Ill. App. 2d 114, 243 N.E. 2d 429; *People* v. *Stock* (1974), 56 Ill. 2d 461, 309 N.E. 2d 19; and *People* v. *Weathers* (1975), 62 Ill. 2d 114, 338 N.E. 2d 880.

These cases rise and fall on their own facts and the particular statements involved vary considerably. What can be gained from these cases is a rough sense as to what constitutes reversible error and what does not. We believe that while some of these statements are not appropriate, the characterization that they portray defense counsel as obstructing justice is indeed tenuous. We conclude that these statements do not warrant the sanction of a reversal.

Both defendants argue that the prosecutor improperly placed the integrity of the State's Attorney's office behind a prosecution witness. They cite a statement where the prosecutor explained how immunity is given and that the State's Attorney determines whether or not immunity should be granted to a witness. They both cite the case of *People* v. *Valdery* (1978), 65 Ill. App. 3d 375, 381 N.E. 2d 1217. The State contends that this statement was made

in response to comments by defense counsel which commented on the immunity given to the State's witnesses. Counsel stated that the State would tell the jury that the State did not give them immunity but rather immunity from a judge. There was an objection to the statement which was sustained. If there was any error it was minimal and it was cured.

Both defendants contend that the prosecutor made impermissible comments suggesting that the jury should convict without regard to the standard of proof beyond a reasonable doubt. In closing argument the prosecutor summed up the State's evidence and then made the following comment: "If somebody came up to you and told you that this is what happened, you would say oh, my God, I think he has got something to do with it." The prosecutor then said that "there are cases * * * tried every day in this very building with no more evidence than that." There was an objection made and sustained by the court. We again believe that any error was cured.

The defendants argue that even if none of the matters individually warrant a reversal, their cumulative effect was to deny them a fair trial. We do not agree. There was evidence from two eyewitnesses that the jury had an opportunity to evaluate. Counsel most competently brought out every negative aspect of those witnesses. We do not believe that these comments, if improper, denied either defendant a fair trial.

Burks contends that the prosecutor argued to the jury that defense counsel's objections prevented the State from introducing crucial incriminatory evidence. The prosecutor commented that "* * * the State only was allowed to elicit certain things about some transactions and pills between the people. Well, even that evidence that we were allowed

to produce, you saw them jumping up and down like jumping jacks, objecting, screaming, running back there —." An objection was overruled. Further, counsel commented that they were allowed to bring out certain things and that the court found other things not relevant. He then stated, "Now they will hide behind those rulings and say they didn't bring those things out, and that is an effort to recreate a false issue, to put out another puff of smoke." An objection was sustained. Burks is correct that these comments were improper. The question before the court is whether or not they warrant reversal. Considering all the evidence we do not believe so.

Burks argues that he was denied the effective assistance of counsel because defense counsel never attempted to interview any of the alibi witnesses. Defense counsel testified that he was familiar with the people that the defendant had mentioned as alibi witnesses. He had represented most of the people in criminal matters. He considered the background of some of the defendant's witnesses and compared them with the background of the State's witnesses. The State suggests that defense counsel made a strategic decision not to present any witnesses at all and instead to focus his defense on the credibility of the State's two occurrence witnesses and their possible motives to lie. The State contends, and we agree, that mistakes in trial strategy will not render the representation incompetent. Counsel was in fact a former Assistent State's Attorney with considerable experience and also had considerable experience as a defense attorney in private practice. The representation of the defendant certainly was not of such low caliber as to amount to no representation at all. *People* v. *Murphy* (1978), 72 Ill. 2d 421, 381 N.E. 2d 677.

Burks contends that he was denied his sixth amendment constitutional right to present evidence because the State granted *de jure* immunity to one occurrence witness but only provided *defacto* immunity to a second. By refusing *de jure* immunity to the second witness, it prevented that second witness from recanting prior testimony. The defendant admits that no case has considered this issue and the only support he has for his argument is the case of *Government of Virgin Islands* v. *Smith* (3d Cir. 1980), 615 F. 2d 964 in which the court said that where there is a deliberate intention to distort the fact finding process, vindictive prosecutorial selectivity violates due process. In that case the juvenile authorities, which properly had jurisdiction over the witnesses, was willing to grant him immunity subject to the consent of the United States Attorney. The court found that the United States Attorney had no justification for refusing to consent and deliberately intended to keep highly relevant exculpatory evidence from the jury. We do not find this type of deliberate intention to distort the fact finding process in the instant case. The right to grant immunity is a power awarded to the State by the legislature. (*People* v. *Frascella* (1980), 81 Ill. App. 3d 794, 401 N.E. 2d 1045.) The courts have no power to grant immunity in order to secure testimony which the defense deems relevant. Also, although Burks contends that the witness' recantation testimony would have been sufficient grounds for a new trial, such testimony is generally considered very unreliable as a basis for granting a new trial. *See People* v. *Frascella.*

Burks claims that he was denied due process when the prosecutor misled the jury concerning benefits that would accrue to Trapp in exchange for his testimony. On this issue the defense strategy was that the State's witnesses,

both Trapp and Shannon, testified to lies for their own benefit. Defense counsel during closing arguments stated that "irrespective of what the State's Attorney will tell you, Shannon and Trapp will not be sent back to the penitentiary system." In response during rebuttal argument the State's Attorney made the comment that Trapp is going to the penitentiary. During post trial motions one of the prosecutors who argued the case testified that he knew that Trapp was to be given some consideration. Burks argues that in the instant case Trapp was not prosecuted and he was not returned to the penitentiary. In another matter pending against Trapp the charges were dismissed. Although the record is not entirely clear on the subject, we do believe that the prosecutor was in error in making the statement. However, considering the extensive cross-examination on the subject and the fact that Trapp admitted that he had become a State's witness in an armed robbery case in hope of receiving some consideration, Trapp's character was fairly before the jury and this one comment does not warrant a new trial.

Burks argues that exculpatory evidence in the form of credible alibi testimony presented at post trial motions requires a new trial. The argument here centers around the fact that the indictment stated that the offense was committed on April 21, 1978. It was later amended to allege that it occurred on a date between March 16 and April 21, 1978. During trial the State's witnesses specifically stated the date as being late in the evening on March 16 and in the early morning hours of March 17. The failure to provide the defendant with a more accurate date was either due to the State's negligence or a deliberate act in withholding the date. This lack of a specific date prevented the defendant from properly presenting an alibi

defense. The State responds that the defendant himself testified at the post trial hearing that the names of the potential alibi witnesses had been given to his defense counsel four to six months prior to going to trial. The propriety of using those witnesses was discussed earlier. The essence of Burks' claim is that the State was responsible for the defense's failure to present the alibi witnesses and the alibi evidence.. That conclusion is not supported by the evidence. This matter was considered by the trial court in a post trial motion. Evidence of this sort is subject to the closest scrutiny. The trial court's discretion in this matter is considerable and we do not believe that it was abused. *People* v. *Miller* (1980), 79 Ill. 2d 454, 404 N.E. 2d 199.

Burks' final argument is that the court was in error in applying the extended term statute because it is unconstitutional. It is alleged to be unconstitutional because it does not contain appropriate standards. This issue was waived because it was not presented to the trial court at the time of sentencing and was not included in the amended motion for a new trial.

The judgments of the circuit court of Cook County are affirmed.

Dated at Chicago, Illinois, this 25th day of March, 1982.

ENTER:

....., Justice.

....., Justice.

GLENN T. JOHNSON, Justice.

No. 82-929

In the

Supreme Court of the United States

OCTOBER TERM, 1982

GERALD BURKS,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner was afforded due process where the record affirmatively demonstrates, and the Appellate Court so found, that evidence of a prosecution witness' bias was fully presented to the jury through cross-examination and argument to the jury, where petitioner waived the issue in the state trial court below and where the record is devoid of support for petitioner's contention that the prosecution made knowing use of perjured testimony, or made a false statement to the jury during argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-929

GERALD BURKS,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Illinois Appellate Court opinion is appended to petitioner's petition for certiorari and is reported below as *People* v. *Eddie Harris*, 104 Ill. App. 3d 1203 (1st Dist. 1982), pursuant to Illinois Supreme Court Rule 23, Ill. Rev. Stat. 1981, ch. 110A, §23.

JURISDICTION

The jurisdictional requisites have been set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has satisfied the jurisdictional prerequisites of 28 U.S.C. §1257(3) or has shown any reason for the Court to exercise its sound discretion to grant his petition for a Writ of Certiorari, especially where the state court ruled on the merits of petitioner's claim.

STATEMENT OF THE CASE

Following a jury trial, petitioner was convicted of the murder of Venson Bass. (R. 522) The evidence at trial established that on March 16, 1978, at about 10:00 p.m., Eddie Harris and Gerald Burks, the petitioner, shot Venson Bass and threw him into Lake Michigan. (R. 197-202, 243, 307-309) The People's witnesses, Herman Shannon and Harry Trapp, were eyewitnesses to the events which resulted in the death of Venson Bass. (R. 197-202, 243, 307-309) On April 21, 1978, the body of Venson Bass was found at 62nd Street and the Lakefront in Chicago, Illinois, by Officer Ryan of the Chicago Police Department. (R. 77-80)

The pathologist's report indicated that Venson Bass had received multiple gun shot wounds to the head and neck. The report also indicated that the victim was alive when he was thrown into the lake because there was a large amount of sand and gravel found in his throat. (R. 90-91, 101) The proximate cause of death was multiple gunshot wounds to the head and neck. (R. 91)

Harry Trapp testified that he had been a narcotics user for many years, including the time of the instant

offense, (R. 312-315) and that he was a convicted felon with a pending charge for armed robbery at the time of petitioner's murder trial in May, 1980. (R. 286) On cross-examination Mr. Trapp was questioned regarding his testimony, one month earlier, as a State's witness in another prosecution arising from an armed robbery, unrelated to the instant murder prosecution, for which Mr. Trapp had been indicted. Mr. Trapp stated that he did not testify in the armed robbery trial in exchange for anything, but rather he testified "with the hope that I could get a lesser sentence." (R. 317) Harry Trapp's testimony was clear and unequivocal, and demonstrated that no one had promised him anything, nor made any deals with him. He consistently testified that his only motive for testifying in the earlier armed robbery trial was that "I was hoping they would be lenient, yes, sir." (R. 318)

Later, still during cross-examination, Harry Trapp was questioned about his motives for testifying in the instant murder prosecution. He stated that he had not been given immunity for testifying in the current case, and that he had not made any deals in return for his testimony. (R. 342) He further stated that no one had ever told him he would not be prosecuted for the murder, and in fact he did not know if he was ever going to be charged with the murder or not. (R. 342-343)

During closing arguments, counsel for the defendants repeatedly directed the jury's attention to the issue of the credibility of Harry Trapp. (R. 457-458, 460-469, 478-479, 481-483) Specifically, defense counsel argued that by testifying as a State's witness here, and in the earlier armed robbery trial, Harry Trapp had made it unsafe

for himself to return to the penitentiary system, due to the system's own "grapevine." (R. 479) "[Y]ou know what these two men have been able to do for themselves by testifying here. They know, irrespective of what the State's Attorney will tell you, there is no way that those men can go back into the penitentiary system." (R. 479) In rebuttal, the prosecutor responded in the following fashion: "Trapp is going to the penitentiary. We are not going to set them up. They are not going to live at the Hyatt Regency tomorrow. They are going to the penitentiary." (R. 493)

Thereafter the jury was instructed that evidence that a witness has been convicted of a crime may be considered when determining that witness' credibility; (R. 505) that the testimony of an accomplice witness is subject to suspicion, should be considered with caution, and carefully examined in light of other evidence; (R. 506) that the jury must determine whether the witness' testimony has been effected by his interest or prejudice against the defendant; (R. 507) and that the testimony of an addict is to be scrutinized with great caution, and that addiction is an important factor going to the general reliability of the witness (R. 508). On May 22, 1980, the jury returned a verdict of guilty of murder against petitioner, Gerald Burks. (R. 522)

On December 29 and 31, 1980, hearings were held on petitioner's amended motion for new trial, his second amended motion for new trial, and his motion to have Harry Trapp granted immunity. On the motion to have Harry Trapp given immunity, the petitioner called an assistant state's attorney who had been one of the prosecutors at petitioner's murder trial. (Report of Proceed-

ings, December 31, 1980, at 76, 79 (hereinafter cited as R.P.)).

When asked if it had been decided that Harry Trapp would not be prosecuted for murder, the prosecutor indicated that, at the time of petitioner's trial, he, the prosecutor, knew that a decision had been made to give Harry Trapp "some sort of consideration," but he was never involved in any discussions and was not aware what consideration would actually be given. (R.P. 81) The prosecutor was never asked if, to the knowledge of the prosecution, any of the testimony given by Harry Trapp at trial was false. Neither was the prosecutor ever asked if he had any knowledge regarding the circumstances of the dismissal of the armed robbery charge pending against Harry Trapp.

After hearing all of the evidence presented, the trial court denied petitioner's post-trial motion. The Illinois Appellate Court affirmed, and the Illinois Supreme Court denied leave to appeal. No post-conviction petition was ever filed.

REASONS FOR DENYING THE WRIT

PETITIONER WAS AFFORDED DUE PROCESS WHERE THE RECORD AFFIRMATIVELY DEMONSTRATES, AND THE APPELLATE COURT SO FOUND, THAT EVIDENCE OF A PROSECUTION WITNESS' BIAS WAS FULLY PRESENTED TO THE JURY, WHERE PETITIONER WAIVED THE ISSUE IN THE STATE TRIAL COURT BELOW, AND WHERE THE RECORD IS DEVOID OF SUPPORT FOR PETITIONER'S CONTENTION THAT THE PROSECUTION MADE KNOWING USE OF PERJURED TESTIMONY, OR MADE A FALSE STATEMENT TO THE JURY DURING ARGUMENT.

This petition must be denied. There is a complete absence of any factual basis to support petitioner's mere allegations that the prosecution made knowing use of perjured testimony, or that the prosecutor made a false statement to the jury during argument. This is due in large part to the petitioner's failure to refer to the instant issue with any degree of specificity in his post-trial motion, thereby waiving appellate review of the issue. Nevertheless, the Appellate Court addressed the issue and properly reached the correct result below when it rejected the instant contention and ruled that the subject of witness Harry Trapp's hoped-for leniency was fully explored at trial, and thus the comment during argument, even if improper, did not warrant reversal. Furthermore, it would violate the well-settled principle of appellate law that reviewing courts are limited to the record were this Court to grant the instant petition, since petitioner's entire argument is predicated, not on the record, but on speculation as to what other facts might exist.

Where there has been a plea agreement, or other similar deal made between the prosecution and one of its witnesses prior to the witness' testimony, the witness denies its existence during testimony, and the government fails to correct the falsity but rather knowingly uses the perjured testimony to its advantage, reversal of any convictions obtained as a result of that testimony is required. *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Moreover, if there is evidence of a plea bargain at some point in time, *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974), would require remand to the trial court to determine through an evidentiary hearing whether the plea bargain occurred prior to the giving of the testimony. However, where there is no evidence in the record to support the allegation that a plea agreement, or other deal, was ever reached between the witness and the prosecution, neither reversal nor remand is warranted. *United States* v. *Ramirez,* 608 F.2d 1261, 1266-67 (9th Cir. 1979); *United States* v. *Piet,* 498 F.2d 178, 182 (7th Cir. 1974), *cert. denied,* 419 U.S. 1069.

In the instant case, petitioner has presented nothing to establish that the prosecutors below promised Harry Trapp that they would dismiss his armed robbery indictment, or that they would not indict him for the murder of Venson Bass, if he testified favorably against petitioner. There is no indication in the record that Harry Trapp's testimony that he made no deals, had been given no promises, and only hoped for leniency, was anything but the truth.

> "While steadfastly denying the existence of a plea bargain both at his own arraignment and at the trial

> of [defendants], [the witness] expressed his hope that the court would favorably consider his cooperation with the government in subsequently sentencing him. *The mere expression of one's hopeful (and not unreasonable) expectation cannot be equated with concrete indicia of an undisclosed plea bargain.*" *United States* v. *Piet*, 498 F.2d 178, 182 (7th Cir. 1974), *cert. denied*, 419 U.S. 1069. (emphasis added)

Thus, with only Harry Trapp's reasonably hoped for leniency as "evidence", petitioner has failed to demonstrate the existence of an undisclosed promise or deal.

Further, the assistant state's attorney who testified at the post-trial motion never testified to the existence of any promise that had been made to, or any deal that had been made with, witness Trapp. Additionally, although the assistant state's attorney testified that he was aware that some consideration, unknown to him, would be given Mr. Trapp, the prosecutor never testified that this fact had been communicated to Mr. Trapp.

Moreover, the petitioner himself contributed to the lack of a record upon which to base his current claim when he failed to question the prosecutor as to the reasons why Harry Trapp's armed robbery case had been dismissed six months earlier. Such a question might very well have disclosed the fact that the State had decided that it no longer had sufficient evidence, for whatever reason, to prosecute Mr. Trapp, and that it was not done pursuant to any "agreement." The prosecutor also was never asked if the prosecution knew any of Mr. Trapp's testimony to be false at the time it was given, or if it knew for a certainty that Mr. Trapp subsequently would not go to the penitentiary when it argued to the contrary at trial. To fail to ask questions such as these when

presented with an opportunity to do so must certainly serve to preclude an argument at this time based upon speculation as to what answers might have been given to the never-asked questions.

Further, although petitioner was ultimately asked certain questions regarding the issue of an alleged undisclosed agreement, it was not pursuant to a motion directed to that issue. Although one of petitioner's post-trial motions referred to the alleged falsity of Harry Trapp's testimony, it was only alleged that his testimony was false as it related to petitioner Gerald Burks. No allegation was ever made that an agreement had been made, or that Harry Trapp had testified falsely in that regard. Thus, review of the issue upon appeal was waived. Illinois criminal procedure requires that a motion for a new trial "specify" the grounds therefore. Ill. Rev. Stat. 1979, ch. 38, §116-1(c). When an alleged error is not referred to at all in a post-trial motion, or is not referred to with sufficient particularity to bring the specific issue to the attention of the trial court, the issue is waived. *Brown* v. *Decatur Memorial Hospital,* 83 Ill. 2d 344, 349-350, 415 N.E.2d 337, 339 (1980); *People* v. *Turk,* 101 Ill. App. 3d 522, 532, 428 N.E.2d 510 (1st Dist. 1981). Thus, where the issue of the alleged deal and the closing argument comment was never specified in a post-trial motion, petitioner waived review of the issue. Moreover, petitioner has never filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. 1981, ch. 38, §122-1.

Petitioner relies heavily on two of this Court's decisions, *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Neither is of benefit to petitioner, but rather each demonstrates

why this petition should be denied. Totally unlike the present situation, in *Napue* it was a matter of record that the prosecutor had in fact made a deal with the witness, and the prosecutor filed a sworn petition to that effect. Therefore, the testimony of the witness, elicited by the prosecutor, that the prosecutor had never promised such a deal, was false and the prosecutor knew it to be so. 360 U.S. at 265-266. No such knowing use of, and failure to correct, perjured testimony, as found in *Napue*, is found in the instant case, and thus denial of the petition is proper.

Similarly, in *Giglio* v. *United States*, *supra*, an unindicted co-conspirator, Taliento, testified at trial that he had not been told he would not be prosecuted if he testified at trial, but rather testified that he believed the government could still prosecute him. 405 U.S. at 151-152. In fact, the affidavit of a prosecutor established that he had "promised Taliento that he would not be prosecuted if he cooperated with the government." 450 U.S. 152. Thus, this Court held that due process required a new trial. 405 U.S. at 155. Again, *Giglio* like *Napue* is distinguishable from the instant case because the record in *Giglio* amply demonstrated that there was a deal or promise that a witness lied about, that the prosecutor knew of the falsity, and that he nevertheless failed to correct the situation.

The same can be said of petitioner's other two cases. In *United States* v. *Pope*, 529 F.2d 112 (9th Cir. 1976), an assistant United States attorney filed an affidavit, establishing that there was an agreement, thereby creating a record with sufficient evidence to warrant a reversal. Similarly, the facts of *United States* v. *Smith*, 480 F.2d 664 (5th Cir. 1973), indicate that there was in fact an

agreement between the prosecution and the witness, and the evidence of that agreement was found in statements made in open court by the prosecutor during the witness' subsequent sentencing. However, the prosecutor never disclosed the extent of the deal at trial, and failed to correct the false testimony of the witness regarding the agreement. Thus, in *Smith* the agreement was a matter of record, and not merely "evidenced" by speculation as in the instant case.

As the court recognized in *United States* v. *Ramirez*, 608 F.2d 1261, 1266 (9th Cir. 1979):

> In cases in which the courts have ordered new trial on *Giglio* grounds, it was clear that an undisclosed agreement of leniency between the Government and the witness had been reached prior to the witness's testimony. Although Zamora [the witness] was indeed allowed to plea to a misdemeanor shortly after appellant's trial, the record is void of any evidence that an agreement allowing such a disposition had been reached at the time of the trial which was not disclosed to the jury. (footnote omitted)

Here, where the record is similarly void of any evidence that an agreement had been reached at the time of trial, or ever, this petition must be denied.

Additionally, the Appellate Court below properly reached the correct result. Although the comment in closing argument that Harry Trapp would go to the penitentiary ultimately proved to be incorrect, there is absolutely nothing in the record to indicate that the prosecutor knew that Trapp would not be tried, convicted, and sentenced on the pending armed robbery charge. Thus, although the Appellate Court noted that the prosecutor was incorrect since Trapp ultimately never

did go to the penitentiary, the subject of Trapp's hoped-for leniency was extensively cross-examined, his character was before the jury, and therefore the Appellate Court held that this one comment, standing alone, did not warrant reversal.

Further, to grant relief on this record, with the absence of any proof that an agreement existed, would create chaos in the law since such action would be in direct conflict with the well-established principle that a reviewing court is limited to the record.

> For an assignment of error, the record must show error; hence, the record must be preserved for an adequate assessment on appeal. This is so because, on review, "the reviewing court is restricted in its examination to the record." A reviewing court may not guess at the harm to an appellant or hypothesize . . . where a record is incomplete. This is not its role. Rather the reviewing court evaluates the record, as it is, for error. Where the record is insufficient or does not demonstrate the alleged error, the reviewing court must refrain from supposition and decide accordingly.

People v. *Edwards,* 74 Ill. 2d 1, 383 N.E.2d 944, 946 (1978) (citation omitted).

That the record is devoid of support for this petition is obvious. Moreover, petitioner already had his opportunity to make a record, and let it pass, when he failed to question the prosecutor more fully. Interestingly enough, since petitioner has never established the existence of an agreement, he was not entitled to an evidentiary hearing under *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). *See, United States* v. *Ramirez,* 608 F.2d 1261, 1267 (9th Cir. 1979); *United*

States v. *Piet*, 498 F.2d 178, 182 (7th Cir. 1974); *United States* v. *Curry*, 497 F.2d 99, 101 (5th Cir. 1974). Thus, although petitioner was able to question one of the trial prosecutors, who did not object to being called, the trial court recognized that he had a right to do so when it sustained the objection of the other prosecutor to being called as a witness, absent some *prima facie* showing of a promise or agreement. (R.P. 17, 18)

In summary, this petition for a Writ of Certiorari should be denied because petitioner was in fact afforded due process where the record demonstrates, and the Appellate Court so found, that evidence of prosecution witness Harry Trapp's bias was fully presented to the jury, where petitioner waived the issue in the state trial court below, and because the record is utterly devoid of support for petitioner's contentions that Harry Trapp committed perjury, or that the prosecution was aware of it at the time but took no action, or that the prosecution made a knowing false statement to the jury during rebuttal argument.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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